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Supreme Court of the United States

OCTOBER TERM, 1957

NO. 595

H. B. LEWIS and D. M. LEWIS, co-partners, trading and doing business as M. G. LEWIS AND SONS GARAGE, and D. M. LEWIS, as executor of the estate of M. G. LEWIS deceased.

Petitioners,

v.

THE STATE ROAD DEPARTMENT OF FLORIDA et al., THE APALACHICOLA-NORTHERN RAILROAD, a Florida corporation, and the ST. JOE PAPER COMPANY, a Florida corporation,

Respondents.

RESPONDENTS' JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents.

RESPONDENTS' JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioners seek a writ of certiorari to review a judgment of the Supreme Court of Florida which affirmed a decree of the Circuit Court of the 2nd Judicial Circuit in and for Leon County, Florida, dissolving a temporary injunction entered by the Circuit Court and dismissing the case.

JURISDICTION

Petitioners seek to invoke the jurisdiction of this Court under 28 U.S.C.A. Section 1257(3) on the grounds a right and privilege are claimed under the Constitution of the United States. Jurisdiction is generally invoked by this Court under that provision of law where the state court

has decided a Federal question of substance not theretofore determined by this court or decided it in a way probably not in accord with the applicable decisions of this court. The question presented in the petition assumes facts contrary to the findings of the Special Master, the decree of the Circuit Court and the opinion of the Supreme Court of Florida and therefore was not presented or decided by the Special Master or the courts. The Federal question decided by the Supreme Court of Florida, has heretofore been determined by this court a number of times and was decided in a way in accord with the applicable decisions of this court. Objections to the jurisdiction of the court duplicate a part of the argument in the brief in opposition and for the sake of brevity will not be repeated here.

QUESTION PRESENTED

The petitioners' question assumes that an obstruction of the public highway for private use by one abutting owner necessitated the change in grade in front of the petitioners' property by the respondent State Road Department of Florida. The report of the Special Master, the decree of the Circuit Court and the opinion of the Supreme Court of Florida determined that this factual situation did not exist, but to the contrary, affirmed that the construction of the overpass involved no physical invasion of the petitioners' property and was a lawful change in grade obtained without malice, negligence, abuse of discretion or diversion of the highway from highway purposes and that any damages sustained by the petitioners as a result thereof were incidental to a lawful use of the street or highway. (Appendix B to Petition for Writ of Certiorari, Pages 31, 32, 33) Therefore, the only Federal question of substance that could have been decided by the state court is:

Is an abutting land owner deprived of his constitu-

tional guaranty against the taking of his property without due process of law when he is not compensated for consequential damages to light, air, view and access occasioned by an authorized change in grade of a street or highway.

STATEMENT

The opinion below, set forth in its entirety beginning on Page 18 of the Appendix to the Petition for Writ of Certiorari, contains a fair and complete statement of the case and may be summarized as follows.

The Respondent State Road Department of Florida, the proper administrative agency, acting within its lawful authority proposed to construct an overpass. The construction of the overpass involved no physical invasion of the petitioners' property. The decision was not arbitrary or capricious and involved no malice, negligence, or abuse of discretion on the part of the respondents. The petitioners contended the consequential injuries sustained by them would result in depriving them of property without due process of law. The construction of the overpass constituted a lawful use or improvement of the highway involved and the damages sustained by the petitioners as a result thereof were incidental to a lawful use of the highway. Under the circumstances, the change in grade of the highway did not constitute a taking or appropriation of petitioners' property and any damages as a result thereof were not compensable.

ARGUMENT

I.

Construction Of The Overpass Was For A Public Purpose

Petitioners in their argument contend that the construction of the overpass was occasioned by the obstruction of a public highway for a private use by one abutting owner.

The Special Master, after hearing all the testimony, found this contention was without merit and was not supported by the evidence. He further made an affirmative finding that the construction proceeded from a matter of public welfare and safety. (Appendix B to Petition for Writ of Certiorari, Pages 30, 31). Both the Circuit Court and the Supreme Court of Florida affirmed these findings of the Master on the grounds that they were supported by substantial competent evidence. The Supplemental Appendix to appellees' brief, hereinafter referred to as "S.A." reveals substantial competent evidence contrary of the petitioners' contention that the construction was for a private purpose and contrary to his statement that the State Road Department never considered constructing an overpass over the two original tracks.

George L. Dickinson, District Engineer for the District, testified:

> "We had planned to build the overpass before the question of permitting the tracks to be laid came up." (S.A. 46)
>
> "The Road Department had planned to build the overpass before Mr. Sharit requested permission to l[a]y these additional tracks.
>
> Q. Was there considerable time before he requested permission of you to lay these additional tracks?
>
> A. As I remember, it was in July before he asked for that authority." (S.A. 47)

Richard H. Simpson, Chairman of the Road Board and Road Board member from the district confirmed the testimony of Mr. Dickinson that the Road Department had decided to build the overpass prior to the request for the laying of additional tracks and that the construction of the overpass was for a public purpose, saying:

> "The first time that I had a request for building the overpass was at Chipley, Florida. That was early in

1953, probably in January. It was at the annual meeting called to hear requests for road building budgets for this district. After the Gulf County Commissioners made their requests for roads, they brought up the matter of the overpass at Port St. Joe and asked that it be considered in the primary budget for 1953. In addition to this request we had a resolution from the City Council of Port St. Joe and a resolution of endorsement from, I believe, the Kiwanis Club and also the Rotary Club at Port St. Joe. All of these resolutions stated the need for this overpass from the standpoint of the safety and convenience of the citizens of Port St. Joe and Gulf County. At this particular time the Road Department had on hand considerable Federal money and there was a material shortage of state money. For this reason this was an ideal time to build a structure in which the Federal Government would participate to a large extent. The matter of finances and the matter of requests from substantial citizens of Gulf County and after a survey by our own engineers and their recommendations, we felt that this was a worthy project for construction by the State Road Department.

Q. Is the reason for the additional contribution by the railroad occasioned by the overpass crossing more tracks than originally was intended?

A. That's correct." (S.A. 26, 27)

Mr. Charles Hopkins, Engineer of Federal Aid with the State Road Department, testified that the Federal Aid engineers had examined the site and plan for the proposed overpass and recommended approval. (S.A. 35) He further testified that the Federal Government would not participate in the cost of construction of an overpass if they did not think it helped public safety and convenience or if they determined the overpass served a private project or private business instead of the public and that they

had taken all of these factors into consideration in the program stage prior to their recommended approval. (S.A. 36, 37)

Mr. William B. Dean, Assistant State Highway Engineer, testified that there would be no appreciable difference in the height of the abutment in front of the petitioners' property for an overpass constructed over the two original tracks and the proposed overpass which extended over the additional tracks. (S.A. 32)

The testimony of these witnesses and of Mr. William F. Hankins (S.A. 40) reveal that the original tracks constituted a hazardous crossing which was located on U.S. Highway 98 and that the construction of the overpass was occasioned for the public purpose of eliminating an extremely hazardous crossing for the benefit, safety and convenience of the public.

II.

Certiorari Is Not Granted To Review Facts.

The decision of the Court below is correct and there is no basis for further review. As this Court has stated:

> "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 45 S.Ct. 496, 497; 268 U.S. 220, 227.

The general rule as stated by this court many times is that findings of fact are conclusive on writ of error to a state court unless there is no evidence to support the findings or uncontradicted evidence contrary to the findings. *Ward and Gow v. Krinsky*, 42 S.Ct. 529; 259 U.S. 503; 66 L. Ed. 1033. *Baltimore & O.S.W.R. Co. v. Burtch*, 44 S.Ct. 165; 263 U.S. 540; 68 L. Ed. 433.

On a writ of error to a state court it is not the province of the Federal Supreme Court to weight conflicting evi-

dence where the record shows testimony supporting the verdict. *Great Northern Ry. Co. v. Donaldson,* 38 S.Ct. 230; 246 U.S. 121; 62 L.Ed. 616.

Not only is the finding of the Master and state courts that the construction of the overpass was for a public purpose supported by ample evidence but we submit that petitioners' contentions are without support in the record.

III.

Petitioners Are Not Deprived Of Property Without Due Process Of Law When Not Compensated For Consequential Injuries

In the absence of statutory authority, consequential losses are not compensable under the due process clause of the Federal Constitution. The due process clause refers only to direct appropriation and not to consequential injuries resulting from the exercise of a lawful power. *Mitchell v. U.S.,* 45 S.Ct. 293, 294; 267 U.S. 341; 69 L.Ed. 644; *U.S. v. Meyer,* 113 F.2d 387, 398; Certiorari denied 61 S.Ct. 174; 311 U.S. 706; 85 L.Ed. 459.

As stated in the case of *U.S. v. Cox,* 190 F.2d 293, 295, 296; Certiorari denied 72 S. Ct. 107; 342 U.S. 867, 96 L.Ed. 652:

> "Just compensation for that which is taken does not include consequential losses to the owner. *Mitchell v. United States,* 267, U.S. 341; 45 S.Ct. 293; 69 L. Ed. 644; *United States v. Petty Motor Co.,* 327 U.S. 372; 66 S. Ct. 596; 90 L. Ed. 729; *United States v. Willow River Power Co.,* 324 U.S. 499, 510; 65 S.Ct. 761, 89 L.Ed. 1101; *United States v. Miller,* 317 U.S. 369, 376; 63 S. Ct. 276; 87 L. Ed. 336. 'Such losses may be compensated by legislative authority, not by force of the Constitution alone. *United States v. Willow River Co., supra,* 324 U.S. at page 510, 65 S. Ct. at page 767, 89 L.Ed. 1101.'"

IV.

There Is No Denial Of The Equal Protection Of Law To Petitioners

A few states by statute or constitutional provision require compensation for consequential injuries but the petitioners are not denied equal protection of law because such consequential injuries are not compensable under the law of the State of Florida. As this court said in the case of *Sauer v. New York,* 27 S.Ct. 686; 206 U.S. 536:

> "The Courts have modified or over ruled their own decisions and each state has in the end fixed and limited, by legislation or judicial decision, the rights of abutting owners in accordance with its own view of the law and public policy. As has already been pointed out, this court has neither the right nor the duty to reconcile these conflicting decisions nor to reduce the law of the various states to a uniform rule which it shall announce and impose."

V.

Consequential Damanges Are Not Compensable Under Florida Law

The Supreme Court of Florida has said on many occasions that a governmental authority was not liable for consequential damages to an abutting land owner caused by an authorized altering of a grade of a street. *Bowden v. City of Jacksonville,* 52 Fla. 216; 42 So.394; *Dorman v. City of Jacksonville,* 13 Fla. 538; *Selden v. City of Jacksonville,* 28 Fla. 558; 10 So.457 (14 L.R.A. 370); *Gold v. City of Tampa* (100 Fla. 1134); 130 So.914; *Natural Gas & Appliance Co. v. Marion County, Fla.,* 58 So.2d 701; *Duval Engineering & Contracting Co. v. Sales, Fla.,* 77 So.2d 431; *Weir v. Palm Beach County and State Road Department*

of Florida, 85 So.2d 865; *Lewis v. State Road Department*, 95 So.2d 248.

VI.

The Federal Question Presented Is Neither Novel Nor In Conflict With The Applicable Decisions

This court has passed upon the exact question involved and has approved the Florida law as being no violation of the 14th Amendment in the case of *Sauer v. New York*, 27 S.Ct. 686; 206 U.S. 536. In this case a deadend street terminated at a bluff. A viaduct ascending to connecting streets atop the bluff was constructed in the deadend street resulting in a change in grade of the street in front of the plaintiff's property thereby impairing plaintiff's easements of access, light, air and view. Plaintiff contended he was denied the due process of law secured to him by the 14th Amendment and that his propert was taken without compensation. The Court held:

> "The state courts have uniformly held that the erection over a street of an elevated viaduct, intended for general public travel, and not devoted to the exclusive use of a private transportation corporation, is a legitimate street improvement, equivalent to a change of grade; and that, as in the case of a change of grade, an owner of land abutting on the street is not entitled to damages for the impairment of access to his land and the lessening of the circulation of light and air over it. *Selden v. Jacksonville*, 28 Fla. 558; 14 L.R.A. 370; 29 Am.St.Rep. 278; 10 So.457."

The citation of *Selden v. Jacksonville, supra*, by this court recognized the established law of Florida which has never been reversed or modified. The court further found that it was also the established law of the State of New York and held:

"Upon the ground, then, that under the law of New York, as determined by its highest court, the plaintiff never owned the easements which he claimed, and that therefore there was no property taken, we hold that no violation of the 14th Amendment is shown."

In the case of *Selden v. Jacksonville, supra,* the Supreme Court of Florida held that the easements of access, light, air and view of an abutting owner are subordinate to the right of the state or any duly authorized governmental agency acting for it to alter a grade or otherwise improve a street for street purposes, and the guaranty of the Constitution that private property shall not be "taken" or "appropriated" without compensation does not extend to mere consequential damages resulting to property abutting on a street from a lawful change of grade of the street. In addition to the many cases cited in this brief holding that consequential injuries to property are not a taking without compensation under the prohibition of the 14th Amendment, this Court, in the cases of *Delaware River Joint Toll Bridge Commission et al v. Colburn, et al,* 60 S.Ct. 1039; 310 U.S. 419; and *Anselmo v. State of Connecticut,* 135 Conn.78; 60 A.2d 767; Certiorari denied 69 S.Ct. 132; 335 U.S. 859; held that the impairment of an abutting owner's easements of access, light, air and view resulting from a lawful improvement of a street or highway did not constitute a taking of the plaintiff's property in the constitutional sense. Recently, this court has consistently refused certiorari in similar cases presenting the question of whether consequential injuries to property are a taking without compensation under prohibition of the 14th Amendment. *U.S. v. Meyer,* 61 S. Ct.174, *supra; U.S. v. Cox,* 72 S.Ct. 107, *supra; Anselmo v. State of Connecticut,* 69 S.Ct. 132, *supra.*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

FORD L. THOMPSON

BRYAN W. HENRY
Counsel for Respondents

November....., 1957

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief in opposition to petition for writ of certiorari has, pursuant to Rule 33 (1) of the Revised Rules of The Supreme Court of The United States, has been served by mail upon Claude Pepper, Counsel for Petitioners, 37 N. E. First Avenue, Miami 32, Florida, this.....day of November, A.D. 1957.

FORD L. THOMPSON